No. 82-52

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

*Petitioners,*

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 12, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

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## RELEVANT DOCKET ENTRIES

### Docket Entries from the District Court

| Date | Filings—Proceedings |
|---|---|
| April 25, 1978 | Complaint |
| May 22, 1978 | Answer |
| June 7, 1979 | Joint Stipulated Statement of Facts |
| August 31, 1979 | Plaintiff's Motion for Summary Judgment |
| August 31, 1979 | Defendants' Motion for Summary Judgment |
| September 28, 1979 | Plaintiff's Memorandum in Response to Defendants' Motion for Summary Judgment |
| September 28, 1979 | Defendants' Reply to Plaintiff's Motion for Summary Judgment |
| October 22, 1979 | Hearing on Motions for Summary Judgment |
| March 13, 1980 | Order certifying the cause as a class action, granting summary judgment in favor of plaintiff and denying defendants' motion for summary judgment |
| March 13, 1980 | Opinion and Judgment of District Court |
| March 24, 1980 | Plaintiff's Motion to Amend Judgment |
| March 24, 1980 | Defendants' Motion to Amend Findings of Fact and Conclusions and for Relief from Judgment |
| March 24, 1980 | Bill of Costs |
| April 3, 1980 | Defendants' Response in Opposition to Plaintiff's Motion to Amend Judgment |
| April 3, 1980 | Plaintiff's Memorandum in Response to Motion to Amend Findings and Conclusions and for Relief from Judgment |
| April 9, 1980 | Plaintiff's Reply Memorandum in Support of the Motion to Amend Judgment |

| Date | Filings—Proceedings |
|---|---|
| April 14, 1980 | Order denying plaintiff's Motion to have Court's opinion and judgment apply retroactively, granting plaintiff's motion for attorney's fees, denying defendant's Motion to Amend Findings of Fact and Conclusions of Law and For Relief from Judgment |
| May 14, 1980 | Defendants' Notice of Appeal |
| May 19, 1980 | First Amended Judgment |

**Docket Entries from the Court of Appeals**

| | |
|---|---|
| January 16, 1981 | Appellants' Opening Brief |
| April 7, 1981 | Appellee's Brief |
| August 12, 1981 | Oral argument |
| March 11, 1982 | Opinion of Court of Appeals and Judgment entered |
| April 5, 1982 | Mandate Issued by Court of Appeals |
| June 29, 1982 | Order of Court of Appeals awarding appellee's attorney's fees in the amount of $8,027.50 |

## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in *Norris v. Arizona Governing Committee for Tax Deferred Annuity* is officially reported at 671 F.2d 330 (9th Cir. 1982) and is set forth in Appendix A of the Petition for Writ of Certiorari.

The opinion of the United States District Court for the District of Arizona in *Norris v. Arizona Governing Committee for Tax Deferred Annuity* is officially reported at 486 F. Supp. 645 (D. Ariz. 1980) and is set forth in Appendix B of the Petition for Writ of Certiorari.

## JOINT STIPULATED STATEMENT OF FACTS

**In the United States District Court**
**For the District of Arizona**

(Title of Case Omitted in Printing)

Plaintiff and defendants present herewith a joint stipulated statement of facts, along with exhibits, which they agree may be considered in connection with cross motions for summary judgment to be filed in accordance with the parties' stipulation dated June 1, 1979. The facts stated are admitted as true by the parties only for purposes of their respective motions for summary judgment. While admitting the truth of all facts stated, each party reserves the right to contest the materiality or relevance of any fact.

In order to avoid setting forth lengthy provisions from various documents, the parties have agreed to attach those documents in their entirety. Other exhibits such as rules are also attached. To the extent that there may be a variation between the characterization of the exhibits and the exhibits themselves, the actual exhibit prevails.

DATED this 8th day of June, 1979.

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By: _____

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## STIPULATED STATEMENT OF FACTS

### I. The Parties

#### A. Plaintiff

Plaintiff Nathalie Norris is a resident of Maricopa County, Arizona. She is now and has been employed by the State of Arizona in the Department of Economic Security. She participates in the State's Deferred Compensation Program adopted by the defendant Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans. She is enrolled in the plan approved by the defendant.

#### B. Defendant

Defendant Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans (Committee) is authorized under A.R.S. § 38-871 to contract for the purpose of establishing tax-deferred compensation and annuity programs for employees of the State of Arizona. For the purposes of this action, defendant State of Arizona shall be deemed to be an employer within the meaning of § 701(b) of Title VII of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(b). Defendants Richard Rabago, Ron Walker, Ted Williams, Walter Madsen, Dave Conner, Russ Webb, and Robert Corbin are present members of the Governing Committee. Prior Committee members adopted the program which is the subject of the complaint.

### II. Jurisdictional Prerequisites

Plaintiff has exhausted her administrative remedies. Charges were filed with the Equal Employment Opportunity Commission on May 5, 1975, and were deferred to the Arizona Civil Rights Division, Department of Law, on June 19, 1975. The Equal Employment Opportunity Commission assumed jurisdiction on August 19, 1975, and Plaintiff received Notice of

Right to Sue from the United States Department of Justice on February 14, 1978. This action was filed on April 25, 1978.

The jurisdiction of the Court is invoked pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343. This action arose in Maricopa County, Arizona.

## III. Description of the Class

This action has been brought pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of the Plaintiff and on behalf of all female employees who have chosen to enroll in or in the future will choose to enroll in the State Deferred Compensation Plan. As of August 18, 1978, there were 1,675 employees participating in the plan, of whom 681 were women. Of these 681 women, 572 had elected some form of future annuity option. As of the same date, ten women had retired, with four electing a life-time annuity payout.

## IV. Description of the Plan

In 1972 the State of Arizona Legislature enacted A.R.S. §§ 38-871 through 38-874. A.R.S. § 38-871 has been amended three times since the original enactment, but none of those amendments has any substantial effect on this litigation. Shortly after the original law became effective, the Governing Committee promulgated rules and regulations which became effective on May 10, 1973. These rules were amended in October, 1974, and the amended version of the rules is attached hereto as Exhibit 1. The joinder agreement completed by the Plaintiff when she joined the plan is attached as Exhibit 2.

The plan is offered to all state employees (about 35,000, approximately 10,000 of whom are university personnel) on a voluntary basis. There is no employer contribution to the plan (except for the support services needed to effect payroll deduc-

tions and employer sanctioned time off to employees to attend group meetings). The benefits which flow from this plan result in immediate tax savings to a participant and a promise by the state to ultimately pay the participating employee a sum of money based upon accumulated values of the employee's account, the exact amount of which will vary in accordance with elections requested by the employee and approved by the state. These options are more fully explained later or in the plan. These benefits most frequently will occur when the employee retires, but may be paid at other times.

After receipt of a favorable letter of determination by the Internal Revenue Service in 1974, the Committee began the process of selecting prospective funding media into which investment of monies deferred by employees could be directed in order for the State of Arizona to be able to meet contingent future liabilities which were to be created by the implementation of the plan. Also in connection with this selection process, a booklet was prepared to aid the marketing of the deferred compensation plan. As a result of the selection process, the defendant Committee selected the following companies to act as funding media:

1. Lincoln National Life Insurance Company (Lincoln or Lincoln National)—The funding vehicle selected by the Committee was a fixed and variable annuity contract. A copy of this contract as issued to the Committee is attached as Exhibit 3.

2. National Investors Life Insurance Company (National Investors)—A fixed annuity contract attached as Exhibit 4.

3. A savings account with the Valley National Bank of Arizona, N.A.—This savings account was a regular passbook savings account. (Valley National Bank was also selected as the custodian bank for the handling of monies deferred by employees and being transferred to the various funding media).

In a subsequent year the Variable Annuity Life Insurance Company (VALIC) and the Hartford Insurance Company (Hartford) were admitted as funding media to offer both fixed and variable annuity to plan participants. The VALIC contract is attached as Exhibit 5 and the Hartford contract is attached herein as Exhibit 6.

In 1977 the ITT Life Insurance Corporation, which offers a life insurance policy connected with an annuity payout option, was added. A specimen copy of insurance contracts which are issued on the life of any individual who selects this funding media is attached as Exhibit 7, together with a blank application form and a completed application form, for exemplary purposes only. Keystone B4 Mutual Fund (Keystone) was also admitted at that time. No specific document was issued to the Committee for persons who choose this option except a prospectus is given to each person selecting the option and this is attached as Exhibit 8. The joinder agreement completed by the person who is enrolling in the plan and similar to the one which has been referred to above as Exhibit 2 is the application for participation in this particular funding media. Keystone does not have an annuity feature connected with any payout option available under the program.

Lincoln, VALIC and Hartford declined to participate in future enrollments of participants in the plan of 1977 when all funding media were required by the Committee to re-bid. However, all persons who had previously chosen to have monies deferred placed pursuant to the contracts issued by those companies were allowed to continue in that media for all past contributions and as to all future contributions if desired. There are no plans to change this arrangement.

In 1976, the Arizona State Employees Credit Union was admitted as a funding media and Valley National Bank resigned shortly thereafter as a funding media because they could not meet the interest credits paid by the Credit Union. Monies previously deferred to the Valley National Bank were

transferred to Arizona State Employees Credit Union. A copy of the account card issued by the Credit Union upon application by the Committee chairman is attached as Exhibit 9.

Neither the Keystone nor the Credit Union have the ability or the authority to offer or pay monies for the life of a person. The only payouts possible from these two funding media are a lump sum or a periodic payment for a definite period of time selected by the employee and approved by the Committee, neither of which are subject to standard mortality tables. However, it would be possible for an employee to request the Committee to transfer all funds accumulated in the Credit Union or mutual fund account and purchase a single premium life annuity contract on that employee's behalf with those monies. However, an annuity purchased in this manner would be subject to mortality tables which are then in effect with the National Investors Life Insurance Company policy, since all other funding media who had offered annuities are not currently funding medias into which the State of Arizona Deferred Compensation Committee would invest monies to be paid out to such employees. However, the contracts described above with the various insurance companies, which are represented by those policies attached as Exhibits 3, 4, 5, 6 and 7 still are in existence with the Committee and will be maintained indefinitely into the future and benefits ultimately paid from them in any manner permitted by the contract if the participating employees so elect and the Committee approves such elections, except as provided in paragraph 5.01 of the plan.

All funding media, except the Credit Union and Keystone provide in the contract and will pay, on direction by the Committee, a stipulated periodic amount for a specified period of time, which amount or time period would be determined by the then present worth of the person's accumulations during the period of time he had been a member of the plan, divided either by the periodic payment amount requested to determine the length of time such an amount would be paid or the period requested to determine the amount. These payments would be

the same for male or female, assuming all other factors are the same.

However, for those persons who elect annuity options, the payouts are subject to mortality tables which are published in the contract with the particular company. These payments are calculated on the basis of the present worth of the person's account at the time payments are to begin divided by the number of months a person of that age and sex is expected to live and factored by any guaranteed payment period. Because females as a class live longer than men as a class, the period of time for which payments are to be made to women as a class would be longer than for men as a class and thus the periodic payment to women is less than for men. The amounts received are determined by the use of actuarial tables published by the particular company. All tables presently in use provide a larger sum to a male than to a female of equal age, account value and any guaranteed payment period. Many women do not live as long as the average man and many men outlive the average woman.

After original selection of the funding media, a booklet was prepared which described the plan by means of a question and answer format and included a copy of the plan therein. A copy of this original booklet is attached as Exhibit 10. Subsequently, upon the addition of the other funding media described above in subsequent enrollment years, this booklet was revised and a copy of the revised booklet is attached as Exhibit 11. Both also contain a verbatim reprint of the plan.

On April 19, 1979, the Committee voted to change its fixed annuity contract from Lincoln National's Group Fund B to Group Fund A. Lincoln National has not issued its policy to the Committee and no copy of this contract is presently available, but it is believed identical with the one attached hereto as Exhibit 3, except the currently credited rate of interest is 8.15% instead of 7½%.

Parenthetically, it is noted the Committee is considering amendments to the plan, its rules and the joinder agreement. These changes are due primarily to the enactment of the Federal Revenue Act of 1978, Public Law 95-600. None of these changes have occurred and it is not known if any in fact will occur before this Court enters its judgment. However, if changes are made, it is agreed this stipulation may be supplemented at that time if the Court deems the changes appropriate or necessary for a proper decision in this case.

**V. Plaintiff Nathalie Norris**

On May 3, 1975, the Plaintiff made application to the Committee to become a participant under the plan and requested that the monies being deferred be invested in the Lincoln National Life Insurance Company's fixed annuity contract. This application was approved by the Committee on May 9, 1975. The Plaintiff has been since that time a participant in the plan and has made no changes in her original joinder application.

The Plaintiff is deferring $199.50 per month into the plan, for which the state has made a promise to pay her monies at a particular time in the future in accordance with her joinder agreement and the plan. In accordance with this promise, the monies being deferred are in fact being invested with the Lincoln National Life Insurance Company's fixed account. At the time she becomes eligible to receive benefits under paragraph 5 of the plan, she can make an entirely different election as to what benefits she would like to receive. The benefits would be calculated on the basis of the accumulated cash value of all monies deferred by her together with any earnings thereon. Options which would be available to her would range from a lump sum payment of that current amount to an annuity payment based upon the rates published by either the Lincoln National or any other funding account which would be in existence at that time.

Assuming that the plaintiff does not increase or decrease the amount which is being deferred by her and that the unit value of her investment is the same today as it is when she becomes eligible to make her election under paragraph 5 and assuming that she elects the same method of payout as she did in her original joinder agreement and further assuming that she made this election at age 65 (this also assumes interest of 7½% per year being currently credited, but which is not guaranteed), the total value of her account at age 65 would be $53,890.93 and the annuity payment that she would receive at that time would be $320.11 per month for life, with ten years certain. However, were the plaintiff a male and assuming that all other factors above to be the same, the payment would be $354.06 per month for life, with 10 years certain.

## VI. Actuarial Tables

In determining the monthly payments for individuals who have chosen a lifetime annuity option, all of the companies participating in the State Deferred Compensation Plan use sex segregated actuarial tables. One of the more common ones used is the 1971 Group Annuity Mortality Table. For example, National Investor uses the annuity table based on male mortality tables exclusively with a six year "setback" for females. "Setback" as used here means the real age of a female is reduced six years. Thus a 65 year old woman is treated as being 59 years old and her monthly annuity based on that age, while a 65 year old male has his monthly annuity based on age 65. Lincoln National on the other hand uses no "setback", but rather has separate tables for males and females. Whatever the table used, the result is the same for all lifetime annuity payouts—a female employee, upon retirement, will receive a smaller monthly payment than would a male retiree who had contributed equal amounts as the female, on the expectation that the female's payments will be spread out over a longer

period of time. However, if the same persons chose any payout other than a lifetime annuity, such as a lump sum, they would receive exactly the same amount. Although life expectancy is the rationale for using sex-segregated mortality tables, other factors affecting longevity, such as smoking habits, alcohol consumption, weight, prior medical history and family history are not specifically taken into consideration in determinating the amount of monthly annuity to be paid. For example, a male who has smoked for thirty years is paid the same as a male who has never smoked. However, in compiling the mortality table upon which the annuity is based, males who smoked were included with males who never smoked.

JUDGMENT

# United States Court of Appeals
## FOR THE NINTH CIRCUIT

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

*Appellee,*

vs.

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, et al.,

*Appellants.*

No. 80-5372

DC CV 78-341 VAC

APPEAL from the United States District Court for the ..... District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of ARIZONA (Phoenix), and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

cc:
9th CCA
Court Reporter
Federal Defender
US Attorney
US Magistrate
Marshal
Probation
Counsel _____

_____
$70 Fees Paid
Judge/CTRM Deputy

A TRUE COPY
ATTEST APR 5 - 1982
PHILLIP B. WINBERRY
Clerk of Court

by: _____
Deputy Clerk

Filed and entered March 11, 1982.